

**United States of America
Before the National Labor Relations Board**

WAYNE/SCOTT FETZER COMPANY
d/b/a WAYNE COMBUSTION, SYSTEMS,

Employer,

and

Case 25-RD-256161

MATTHEW PASSWATER,

Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,
and its LOCAL 937,

Union.

Opposition to Request for Review

The United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local 937 (collectively “the Union”) submits this opposition to the Employer’s Request for Review.¹ The Employer is seeking review of the portion of the Regional Director’s “Order Directing Hearing and Notice of Hearing on Objections,” dated March 24, 2020 (“the Order”) finding that four of the Employer’s offers of

¹ From the outset, the Employer’s Request for Review is procedurally deficient. Any party filing a request for review with the Board must “file a copy with the Regional Director” and a “certificate of service shall be filed with the Board together with the document.” 29 CFR § 102.67(i)(2). Such service was required by no later than April 7, 2020. *See* 29 CFR § 102.67(c). Despite the clear rules, the Employer’s certificate of service indicates that it failed to serve a copy of its Request for Review on the Regional Director until mid-day on April 8, 2020 when it filed a “revised” Request for Review.

proof were insufficient to support its objections.² However, the Employer has failed to establish any basis under Rule 102.67(d) for the National Labor Relations Board (“the Board”) to grant review of the Order.

Under the Board’s Rules and Regulations, a request for review should only be granted if: (1) a substantial question of law or policy is raised because the Regional Director has departed from, or failed to apply, Board precedent; (2) the Regional Director’s factual findings are clearly erroneous on the record and prejudicially affect the rights of a party; (3) there was prejudicial error arising from the conduct of the hearing; or (4) there are compelling reasons for reconsideration of an important Board rule or policy. *See* 29 CFR § 102.67(d). None of these factors are present here.

The Employer apparently argues that the Regional Director departed from, or failed to apply, Board precedent in three ways: (1) by rejecting certain offers of proof supporting objections that the Regional Director otherwise set for hearing; (2) by excluding evidence because it involved conduct that occurred prepetition; and (3) by excluding evidence because it was mischaracterized or viewed in isolation. For the reasons described below, each of these arguments are unpersuasive. In short, the Regional Director is clearly authorized to investigate and evaluate all of the Employer’s offers of proof, and correctly exercised that authority here. In exercising that authority, the Regional Director rejected four of the Employer’s offers of proof. However, despite the Employer’s arguments to the contrary, the Regional Director did *not* reject these offers of proof because they involved prepetition conduct. Nor did she mischaracterize or

² For the purpose of this Statement in Opposition, citations to the Regional Director’s Order will be “RD Ord.” followed by a page number, and citations to the Employer’s Request for Review will be “Er. RFR” followed by a page number.

view the evidence in isolation. Instead, the Regional Director applied clear Board precedent to the facts here and concluded that the Employer failed to produce sufficiently detailed evidence in these four offers of proof. For this reason, the Regional Director correctly rejected the Employer's offers of proof in part.

The Employer has not identified any legitimate grounds for review of the Order. Accordingly, the Union respectfully requests that the Board deny the Employer's Request for Review and refrain from issuing a Notice to Show Cause.

ARGUMENT

I. The Board's Rules and Regulations Authorize the Regional Director to Evaluate the Evidence Described in the Employer's Offer of Proof.

The Employer first appears to argue that the Regional Director lacked authority to "split" the offers of proof and exclude certain evidence from being presented in support of objections that were set for hearing. Specifically, the Employer begins by arguing that the Regional Director "erroneously rejected certain Offers of Proof" and "erroneously and prematurely made evidentiary rulings to exclude certain Offers of Proof," and maintained that "the Board's Rules and Regulations do not authorize the Regional Director to split Offers of Proof in the manner that occurred here ..." *See* Er. RFR, at 2-3. That is not so. The Board's Rules and Regulations explicitly authorize the Regional Director to investigate and evaluate the Employer's offers of proof, and the Regional Director's Decision is fully consistent with existing Board law and the applicable Rules and Regulations. Accordingly, there is no basis for granting review under the Board's Rules and Regulations. *See* 29 CFR § 102.67(d)(1).

The Employer bears the heavy burden of producing sufficient evidence in its offers of proof to demonstrate that substantial and material issues of fact exist that would warrant setting

aside the election. *See* 29 CFR 102.69(d); *Bell Foundry Co. v. NLRB*, 827 F.2d 1340 (9th Cir. 1987). The Regional Director found that certain offers of proof submitted by the Employer failed to meet this standard, and directed only a limited hearing on the remaining issues.

The Board's Rules and Regulations clearly authorize the Regional Director to evaluate the evidence contained in an offer of proof supporting objections. Specifically, the Rules and Regulations provide:

If timely objections are filed to the conduct of the election or conduct affecting the results of the elections, *and the Regional Director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing* ... the Regional Director shall transmit to the parties ... a Notice of Hearing before a Hearing Officer at a place and time fixed therein.

29 CFR § 102.69(c)(ii) (emphasis added).

More still, the Regional Director's authority to investigate and examine evidence offered in support of objections was further codified in the 2014 amendments to the Board's election procedures, which remain in effect. 79 Fed. Reg. 74412 (Dec. 15, 2014).

The Regional Director is explicitly authorized to evaluate the specific evidence presented in the Employer's offers of proof, and must be allowed to do so. After conducting such a review here, the Regional Director correctly found that certain evidence contained in the offers of proof were deficient and unable to support the Employer's objections.

II. The Regional Director Rejected the Employer's Offers of Proof Because the Employer Failed to Produce Sufficient Detail.

Insofar as the Employer appears to tacitly acknowledge the Regional Director's authority to evaluate the offers of proof and instead takes issue with the quality of the evaluation, those arguments are also without merit. In its Request for Review, the Employer maintains that the

Regional Director erroneously excluded evidence of pre-petition conduct and improperly mischaracterized or considered the Employer's evidence in isolation. *See* Er. RFR, at 3. Neither of these arguments accurately reflect the Regional Director's Decision.

The Regional Director did not erroneously exclude evidence of pre-petition conduct. The relevant time frame for considering alleged objectionable conduct is the period after the filing of the petition. *More Truck Lines*, 336 NLRB No. 772 (2001); *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961); *NLRB v. Wis-Pac Foods Inc.*, 125 F.3d 518, 521 (1997). Only in very limited circumstances will the Board consider prepetition conduct. *Dresser Industries*, 242 NLRB 74 (1974); see also *Shamrock Coal Co.*, 267 NLRB 625 (1983) (prepetition conduct could be considered if was directly related to postpetition conduct and used to shed light on events occurring in the critical period). While the Employer argues that the Regional Director mischaracterized evidence by focusing on the prepetition conduct³ and viewed the evidence in isolation by analyzing each alleged incident separately.⁴ This is simply not accurate. However, whether the evidence is viewed in isolation or occurred prepetition is irrelevant here, since this was not the basis for the Regional Director's decision to reject the Employer's offers of proof.

³ *See, e.g.*, Er. RFR at 4 (arguing that "the Regional Director mischaracterized Objections 1 and 2 by limiting the time period of misconduct as 'on unspecified dates during the critical period after the petition was filed and prior to the election.'").

⁴ *See, e.g.*, Er. RFR at 3 (arguing that the Regional Director erred by viewing alleged harassment, coercion, or threats in isolation, because "viewing each incident in a vacuum fails to adequately demonstrate the scope of the Union's inappropriate conduct that destroyed the laboratory conditions required for a fair election.").

Instead, the Regional Director correctly found that the Employer failed to produce sufficient evidence to support its vague and conclusory allegations regarding the prepetition conduct. *See* RD Ord., at 3-4. Specifically, the Regional Director rejected the Employer’s offers of proof for the following reasons:

Offer of Proof	Basis for Rejection
<i>First Rejected Offer of Proof:</i> “On an unspecified date prior to the filing of the petition on February 11, 2020, Ellis aggressively confronted and interrogated employees about a rumor that employees were considering circulating a petition to have the Union removed.” <i>See</i> Er. RFR, at 6,	The Regional Director rejected this because the Offer of Proof failed to “describe the substance, manner, or circumstances of the alleged confrontation or interrogation.” <i>See</i> RD Ord., at 3.
<i>Second Rejected Offer of Proof:</i> “On an unspecified date prior to the filing of the petition on February 11, 2020, an employee overheard Union Steward Mike Labarbera state, in reference to employees who were considering circulating a petition to remove the Union, ‘That scab, I’d like to take a bat to [their] head.’”	The Regional Director rejected this because it “fails to sufficiently describe the event to warrant setting it for hearing” because “the offer of proof does not identify to whom Labarbera was speaking, how the witness came to hear the alleged statement, where the incident took place, nor any other context of the purported statement.” <i>See</i> RD Ord., at 3.
<i>Third Rejected Offer of Proof:</i> “On March 5, 2020, Ellis asked an employee, ‘So, how long were your kids in foster care.’ Immediately after this comment was made, Waldren approached a different employee in the area and walked to the voting area with them in order to interfere with the employees’ plans to walk to the polling place together.”	The Regional Director rejected this because “the Employer’s offer of proof fails to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.” <i>See</i> RD Ord., at 3-4.
<i>Fourth Rejected Offer of Proof:</i> “Around February 28, 2020, Ellis sent to another employee hostile text messages which disavowed their friendship and then, when Ellis inadvertently called that employee thereafter, was overheard saying ‘I got this bitch I’m dealing with. I’m going to kick her ass.’”	The Regional Director rejected this because the “offer of proof fails to describe the alleged hostile language or circumstances of the text messages or to otherwise show there was any relationship of the text messages to the decertification petition or union support” and “fails to describe any evidence that the Employer plans to introduce which would connect the alleged threat during the unintentional phone call to the decertification petition or union support.” <i>See</i> RD Ord., at 4.

While the Regional Director noted that several of these offers of proof concerned allegations of pre-petition conduct, the Regional Director relied on the Employer's failure to provide sufficient detail or to link these incidents to the Union's response to the decertification effort. In addition, the Employer argues that the Regional Director improperly viewed the evidence in isolation. This argument also fails. The Regional Director simply – and correctly – found that the Employer failed to meet its burden of production with respect to these offers of proof. *See* RD Ord. at 4 (“The Employer’s objections and offer of proof concerning the above conduct do not sufficiently describe the relevant circumstances and specific conduct which warrant invalidating the results of the election.”). Having found that the Employer failed in this way, the Regional Director exercised her legitimate authority and decided not to direct a hearing over this alleged misconduct. *Id.* (citing 29 CFR 102.69(d); *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1344 (9th Cir. 1987)). There was no missing “the forest for the trees” by the Regional Director here. *See* Er. RFR at 10. Instead, the Employer simply failed to produce sufficient detail and evidence necessary to support its offers of proof.

Accordingly, nothing in the Order provides any grounds for review under the Board's Rules and Regulations, as the Regional Director properly exercised her authority and correctly applied existing Board precedent. The Employer's Request for Review should be denied.

III. The Regional Director's Decision to Reject the Employer's Offers of Proof was Sound.

The Regional Director's conclusion that the Employer failed to produce sufficient evidence is supported by correct legal precedent and without any factual findings that were clearly erroneous. The Employer has no grounds under the Board's Rules and Regulations for requesting review of the Order.

As the objecting party, the Employer had the burden of providing evidence in support of its objections. *See* Casehandling Manual (Part Two), at § 11392.10. Given this, the Regional Director correctly stated that “the objecting party bears the burden of furnishing evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.” *See* RD Ord. at 3 (*citing Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. op. 1, fn. 2 (2017); *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010)). The Employer could have met its burden by specifically identifying witnesses who would provide direct – not hearsay – testimony to support its objections. *See, e.g., Builders Insulation Inc.*, 338 NLRB 793, 794-95 (2003).

Acknowledging the high standard created by the applicable Board law, the Regional Director found that the Employer “failed to produce sufficient evidence showing that substantial and material issues of fact exist that would warrant setting aside the election.” *See* RD Ord. at 3. This conclusion was based on the Regional Director’s evaluation of the evidence, which, among other deficiencies, failed to sufficiently described the alleged misconduct or events surrounding the alleged misconduct, failed to provide sufficient context regarding witness testimony, or failed to link any alleged misconduct to union support or the decertification petition. *Id.* at 3-4.

The Employer’s Request for Review does not substantively address the Regional Director’s conclusion in this respect, offering only brief conclusory or dismissive responses. *See, e.g.,* Er. RFR at 8 (“It is simply not feasible for an Offer of Proof to address every possible contextual detail.”).

The Regional Director’s Order was consistent with the Board’s Casehandling Manual and relevant Board law, and her findings that the Employer’s offers of proof were deficient in part were not clearly erroneous.

As such, the Union respectfully requests that the Request for Review be denied.

CONCLUSION

As demonstrated by the foregoing, the Employer has failed to articulate any grounds under the Board's Rules and Regulations to support its Request for Review of the Order. The Regional Director correctly applied existing Board precedent and none of her factual determination were clearly erroneous. Accordingly, the Union respectfully requests that that the Board deny the Employer's Request for Review.

Dated: April 13, 2020

Respectfully submitted,

Antonia Domingo
Assistant General Counsel
United Steelworkers

Zachary Hebert
Assistant General Counsel
United Steelworkers

cc: Robert Hicks, Macey Swanson LLP
Jon Doust, USW Sub-District Director

CERTIFICATE OF SERVICE

I, the undersigned, hereby state that on April 13, 2020, a copy of the above-titled document was served by electronic mail upon the following persons, addressed to them at the following addresses:

Patricia K. Nachand, Regional Director
National Labor Relations Board, Region 25
575 N. Pennsylvania Street, Suite 238
Indianapolis, Indiana 46204
Patricia.Nachand@nlrb.gov

Stephen J. Sferra
Jeffrey A. Seidle
Littler Mendelson, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
ssferra@littler.com
jseidle@litter.com

Matthew Alan Passwater
12917 County Shoal Lane
Grabill, Indiana 46807
Passwater2@yahoo.com

/s/ Zachary A. Hebert
United Steelworkers
60 Boulevard of the Allies, Room 807
Pittsburgh, Pennsylvania 15222
zhebert@usw.org